

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

**Determination of Royalty Rates and
Terms for Making and Distributing
Phonorecords
(*Phonorecords IV*)**

**Docket No. 21–CRB–0001–PR
(2023–2027)**

**SERVICES’ UNOPPOSED MOTION TO ACCESS AND TO MAKE USE OF
RESTRICTED *WEBCASTING V* EXPERT MATERIALS AND TRIAL EXHIBITS**

Under 17 U.S.C. § 801(c), Amazon.com Services LLC, Pandora Media, LLC, Apple Inc., and Spotify USA Inc. (collectively, the “Services”) request that the Judges allow their outside counsel and experts full access to and use of the restricted versions of the following materials from the *Webcasting V* record: (1) the written, deposition, and trial testimony of economic experts Jon Orszag, Carl Shapiro, and Steven Peterson; (2) the appendices and exhibits to the testimony of all three of those experts, excluding agreements between the record labels and non-*Webcasting V* participants; and (3) trial exhibits 4104 and 4105, to the extent not already captured in the two prior requests (together, the “*Webcasting V* Materials”).¹ The requested relief is unopposed.²

¹ The request excludes any restricted information of any member of the National Associate of Broadcasters (“NAB”), although this exclusion is without prejudice to the ability of the Services or Copyright Owners to request access to that information in the future. NAB has agreed to create versions of the *Webcasting V* Materials that redact that information within 24 hours of the entry of the Judges’ order granting this motion.

² The Services have conferred with the other participants in this proceeding eligible to review restricted information, including the National Music Publishers’ Association and Nashville Songwriters Association International (together, “Copyright Owners”), and with the participants in *Webcasting V*. Google LLC (“Google”) joins Amazon’s request for access to the *Webcasting V* Materials but does not agree to the conditions the Services accept below and so will be filing separately. The Copyright Owners do not oppose the motion. The Services have no objection to any other eligible *Phonorecords IV* participant, including the Copyright Owners, obtaining access to the same materials requested in this motion. As for the participants in *Webcasting V*, Sirius XM Radio, Educational

The Services agree that use of these materials would be subject to the *Phonorecords IV* and *Webcasting V* Protective Orders.³ To that end, the restricted *Webcasting V* Materials would be treated as “Restricted” under both Protective Orders and may be used only by outside counsel and experts in this proceeding.

The Services have also agreed with SoundExchange that their access to and use of the requested materials will be subject to the screening restrictions to which they stipulated and that the Judges imposed in connection with the prior request for access to restricted *Webcasting V* decisions. See Order Granting in Part Services’ Motion for Access to Restricted *Web V* Materials, Docket Nos. 19-CRB-0005-WR & 21-CRB-0001-PR (Aug. 9, 2021). Specifically, the Services and SoundExchange have agreed that:

Individuals who would otherwise be permitted to review the *Web V* materials under the Protective Orders entered in *Phonorecords IV* and *Web V* but who are involved on behalf of digital music services in negotiating license agreements with sound recording companies shall not be permitted . . . to review restricted information concerning record company bargaining objectives, bargaining strategy, perceptions of bargaining power, or other similar information contained in the *Web V* materials (collectively, Licensing Information). Eligible Participants who receive the *Web V* materials shall ensure outside counsel or experts who are involved on behalf of digital music services in negotiating license agreements with sound recording companies are screened from the Licensing Information.

Id. at 2.⁴ The Copyright Owners have also stated that they will agree to this same stipulation and, if this motion is granted, request access to the same materials. The Services consent to that

Media Foundation, and the National Religious Broadcasters Noncommercial Music License Committee (“NRBNMLC”) do not oppose this motion; NAB takes no position on it. SoundExchange and the record labels that are participants in *Webcasting V* and *Phonorecords IV* (collectively, “SoundExchange”) do not oppose access to and use of the requested *Webcasting V* Materials by Services or other eligible *Phonorecords IV* participants that agree to be bound by screening restrictions imposed under the August 9, 2021 Order Granting Access To and Use Of the *Webcasting V* Initial Determination and Future Substantive Rulings. SoundExchange opposes access to and use of the requested *Webcasting V* Materials by any eligible *Phonorecords IV* participant that does not agree to be bound by these screening restrictions.

³ In the event of a conflict between the protective orders, the more restrictive provision will govern.

⁴ The stipulation also provided the following provision: “To the extent any outside counsel or expert is bound by the *Webcasting V* Protective Order and already has access to the *Webcasting V* Materials by virtue of their participation

request and propose in the attached order that the Copyright Owners be given access to the *Webcasting V* materials on the same terms proposed above.

ARGUMENT

I. The *Webcasting V* Materials Are Relevant To This Proceeding

The Judges' Final Determination in *Webcasting V* makes it clear that the requested materials are highly relevant to this proceeding. In *Webcasting V*, the Judges determined the royalty rates for the performance of sound recordings on non-interactive services by evaluating

[REDACTED]

[REDACTED]

[REDACTED]. See

Final Determination at 94-162, *Web V*, Docket No. 19-CRB-0005-WR (2021-2025) (July 22, 2021). The Judges opined on [REDACTED]

[REDACTED]. See, e.g., *id.* at

120-123, 125, 152-153. Although *Webcasting V* and this proceeding concern different licenses and licensees, the Judges' benchmarking analysis in *Webcasting V* focused predominantly on [REDACTED]

[REDACTED]. The Judges' conclusions about [REDACTED]

[REDACTED] directly implicate

their use in this proceeding.

in that proceeding, nothing in this stipulation is intended to limit such access." Stipulation Regarding Access To and Use of *Web V* Materials in *Phono IV*, Docket Nos. 19-CRB-0005-WR & 21-CRB-0001-PR (Aug. 5, 2021). Pandora, which is represented in this proceeding by the same counsel as in *Webcasting V*, joins this motion subject to and with the explicit understanding that its counsel is covered by this provision. Spotify is represented by counsel who have access to materials from *Webcasting V* as a result of their representation of a participant in that proceeding, and thus joins subject to and with the explicit understanding that those attorneys are likewise covered by this provision. Google has reviewed only the redacted version of this motion. Google joins in the request but does not consent to the screening restrictions specified in this paragraph. Google will be filing separately with its position.

The Judges based their benchmarking conclusions on the expert opinions of Drs. Orszag, Shapiro, and Peterson, *see id.* at 94-161, as well as trial exhibits 4104 and 4105, *id.* at 66-71. Dr. Orszag, for example, used [REDACTED]

[REDACTED]

[REDACTED]. *Id.* at 125. The Judges rejected [REDACTED]

[REDACTED].

Id. at 125-126. However, the Judges [REDACTED]

[REDACTED]

[REDACTED]. *See id.* Dr. Shapiro, by contrast, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. *Id.* at 121-123. The Judges offered an extensive analysis on the merits of [REDACTED]

[REDACTED]. *See id.* at 123-124. And Dr. Peterson proposed [REDACTED]

[REDACTED].

Id. at 152-153. The Judges agreed with Dr. Peterson that [REDACTED]

[REDACTED]. *See id.* at 152-153, 159-160. Trial exhibits 4104 and 4105 – [REDACTED]

[REDACTED] on which Dr. Peterson relied – also [REDACTED]

[REDACTED]

[REDACTED]. *See id.* at 66-72.

Because the Judges based their holdings on the material requested here, the Services require access to that material in order to understand fully the implications of the Judges' Determination on the Services' benchmarking efforts in this proceeding. The Services require the ability to access and use the expert materials, in particular, to understand the Judges' findings about the propriety and persuasiveness of the experts' proposals and calculations. In addition, the Services request the underlying evidence that formed the basis of the Judges' rulings regarding adjustments to benchmark agreements that may – or may not – be equally applicable here.

II. The Judges' Precedents Support the Services' Request

The Judges have previously granted similar requests to use in one proceeding restricted evidence from a prior proceeding. *See, e.g.*, Order Granting in Part Motion For Access to the Restricted *Phonorecords III* Determination and Certain Restricted *Phonorecords III* Testimony at 1, *Web V*, Docket No. 19-CRB-0005-WR (2021-2025) (Sept. 13, 2019) (“*Webcasting V* Order”) (granting access to restricted *Phonorecords III* expert testimony, exhibits, and appendices); Order Granting in Part and Denying in Part Services' Motion to Set Specific Discovery Deadlines and Compel Copyright Owner Participants' Adherence to their Discovery Obligations at 4, *SDARS III*, Docket No. 16-CRB-00001 SR/PSSR (2018-2022) (Aug. 23, 2016) (“*SDARS III* Order”) (granting access to *Webcasting IV* documents); Order Granting in Part and Denying in Part Services' Omnibus Motion to Compel SoundExchange to Produce Documents at 5, *Web IV*, Docket No. 14-CRB-0001-WR (2016-2020) (Jan. 15, 2015) (granting access to prior unredacted deposition and trial testimony from experts in *Webcasting II* and *Webcasting III*).

Most recently, in *Webcasting V*, the Judges granted a motion by SoundExchange to access restricted *Phonorecords III* expert materials – including testimony, exhibits, and

appendices – for use in its written direct case. *See Webcasting V* Order. Like the Services here, SoundExchange argued that the values derived by the experts “formed the foundation of the Judges’ determination” and, therefore, “the analyses considered and weighed by the Judges in *Phonorecords III* could be relevant to [the *Webcasting V*] proceeding.” SoundExchange’s Motion for Access to the Restricted *Phonorecords III* Determination and the Restricted *Phonorecords III* Testimony, Exhibits and Appendices of Expert Witnesses at 2-4, *Web V*, Docket No. 19-CRB-0005-WR (2021-2025) (July 25, 2019). The Judges granted the request, recognizing that the ability of participants in a later proceeding to elaborate fully on the relevance of restricted materials from a prior proceeding is constrained by the restricted nature of those materials. *Webcasting V* Order at 3 (“Movants would need access to the redacted relative value material in order first to decide whether and how to make their own assertions regarding such relative values in their Written Direct Statements.”). The Judges also found that the request was not overbroad, because “[f]or the experts’ analyses to be properly understood . . . Movants would need access to the documents that underlie the opinions of the experts and the findings of the Judges.” *Id.* Thus, as was the case with SoundExchange’s mirror request in *Webcasting V*, this proceeding will be “enhanced, to the benefit of the Judges,” if the *Phonorecords IV* participants have access to the restricted *Webcasting V* Materials so they “can make informed decisions as to the presentation of their direct cases.” *Id.*

Similarly, in *SDARS III*, the Judges granted the Services permission to access and use a limited set of standalone documents produced by SoundExchange in another proceeding. *SDARS III* Order at 4. The Judges noted that, like here, the request for those documents was narrow, and the burden on SoundExchange was minimal since it had already reviewed and produced those documents in the prior proceeding. *Id.* Thus, the Services’ unopposed request to

access and use trial exhibits 4104 and 4105 – to the extent not already covered in the expert materials – also falls squarely within the scope of the Judges’ prior rulings.⁵

CONCLUSION

The Services request that the Judges promptly grant this unopposed motion and rule that they may have access to and use the restricted *Webcasting V* Materials in this proceeding, subject to the *Phonorecords IV* and *Webcasting V* Protective Orders and the prior screening restrictions to which the Services stipulated and the Judges imposed, discussed *supra*. The Judges should direct the overlapping parties in *Phonorecords IV* and *Webcasting V* – Google LLC and Pandora Media, LLC – to provide copies of the restricted versions of the *Webcasting V* Materials to the Services’ and the Copyright Owners’ outside counsel in this proceeding.

The deadline for the *Phonorecords IV* participants to submit their direct cases is rapidly approaching. The participants – and, more importantly, their experts – require sufficient time to analyze the *Webcasting V* Materials and address them as appropriate in their direct statements. For that reason, the Judges should grant this motion as promptly as reasonably possible.

⁵ For the reasons explained *supra*, trial exhibits 4104 and 4105 presumably are covered by the Services’ request for the expert materials – Dr. Peterson’s materials in particular. However, out of an abundance of caution, the Services request these exhibits separately.

Dated: August 30, 2021

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Proof of Delivery

I hereby certify that on Monday, August 30, 2021, I provided a true and correct copy of the SERVICES' UNOPPOSED MOTION TO ACCESS AND TO MAKE USE OF RESTRICTED WEBCASTING V EXPERT MATERIALS AND TRIAL EXHIBITS to the following:

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Google LLC, represented by Gary R Greenstein, served via ESERVICE at ggreenstein@wsgr.com

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Signed: /s/ Joshua D Branson